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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 183

HENRY W. TAFT and JULIA W. S. TAFT,
Petitioners,

AGAINST

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals, Second Circuit, and Supporting Brief.

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CLARENCE CASTLE MORE,
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Petitioners,

AGAINST

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition of Henry W. Taft and Julia W. S. Taft for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry W. Taft and Julia W. S. Taft, respectfully show to the Court as follows:

Opinions Below.

The opinion of the Board of Tax Appeals is reported in 40 B. T. A. 229 and is produced in full in the record at pages 16-21. The United States Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals without opinion on the authority of *Pierce* v. *Helvering*, 100 Fed.

(2d) 397 (C. C. A., 2nd). Decision was handed down on April 22, 1940.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Questions Presented.

1. Whether husband and wife who file a joint income tax return are a single taxpayer or are two separate and distinct taxpayers.

2. Whether the limitation on the deduction for contributions to charities to 15% of the taxpayer's net income must be computed with reference to the husband's and wife's separate net income where a joint return is filed, or whether it may be computed on their combined net income.

3. Whether the Board of Tax Appeals erroneously barred certain evidence from the record.

4. In the alternative, whether under the peculiar circumstances of this case, the husband was, in fact and in substance, the donor of these gifts and hence the "taxpayer" within the meaning of the statute.

Statutes Involved.

Revenue Act of 1934 (48 Stat. 680):

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(c) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary."

"SEC. 51. INDIVIDUAL RETURNS.

* * * * * *

(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

Statement of the Case.

The facts, as stipulated, Record, pages 31 and 32, and as found by the Board, Record, pages 16-21, are briefly as follows:

Petitioners are husband and wife living together and reside in the City of New York. They filed joint income tax returns for the calendar years 1934 and 1935. The return for the year 1934 showed an aggregate net income of $83,682.99, after a deduction of $2,852 was taken from gross income on account of contributions made by both petitioners during the year to charities. Of this latter sum, $1,477 represented contributions made by the wife. The wife's net income, computed without reference to such contributions for the year and reported in the return, amounted to $12.10. The return for 1935 reflected an aggregate net income of $92,374.59, after deducting $2,715.80 for charitable contributions made in the year. Of this latter sum, $1,545.80 represented contributions made by the wife. The wife's net income in 1935, computed without reference to such contributions, amounted to $15.30. During the years 1934 and 1935, and for many years prior thereto, the husband had transferred funds to the wife by means of bank checks and cash. Such gifts in 1934 and 1935 totalled more than $9,000 a year. Such checks and cash were in the main deposited by the wife in her own bank account and checked out by her for such purposes as she desired, including the charitable gifts in question. No conditions were attached to the gifts of the husband to the wife and no restrictions were imposed upon the use to which the wife might devote the proceeds thereof. The husband consulted with the wife at times respecting her gifts to charity, and at times made suggestions with reference thereto, but did not direct what gifts the wife should make or control her actions with respect thereto. Except for the nominal income listed above which was derived

from dividends on six shares of Continental Can Company stock, the wife had no income or source of revenue and all of the gifts by the wife were made from a fund built up and accumulated from money supplied by the husband. The husband testified that for a number of years he had known about his wife's charitable gifts and that each year he had procured from her a complete list of them (Rec., p. 33).

In auditing the returns, the Commissioner reduced the amount of deduction claimed for the wife's gifts in 1934 from $1,477 to $1.81, and the amount of deduction claimed for gifts in 1935 $1,545.80 to $2.30. This result was reached by limiting the deduction to 15% of the wife's separate net income, to wit, 15% of $12.10 for the year 1934, and 15% of $15.30 for the year 1935.

The Board of Tax Appeals sustained the Commissioner's determination. The taxpayers appealed to the United States Circuit Court of Appeals. The errors assigned and argued are set forth in detail at pages 25 and 26 of the record. The Circuit Court of Appeals affirmed the decision of the Board without opinion on authority of *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, which case holds that a husband and wife filing a joint return are separate taxpayers and that the excess of capital losses of the one may not be deducted from the capital gains of the other. The decision of the Circuit Court of Appeals made no mention of the argument of the petitioners that the husband was the real donor of the charities in this case or of the argument that the Board had abused its discretion in barring certain testimony from the record.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that a husband and wife filing a joint return are separate taxpayers and that the separate statutory

net income of each must first be computed in arriving at the aggregate income which is subject to the tax.

2. The Circuit Court of Appeals erred in failing to hold and decide that husband and wife filing a joint return are a single taxpayer or taxable unit and that the aggregate income to be taxed is the combined gross income of both less the combined deductions of both.

3. The Circuit Court of Appeals erred in holding and deciding that the allowable charitable deduction of the wife is limited to 15% of the wife's separate net income.

4. The Circuit Court of Appeals erred in failing to hold and decide that the allowable charitable deduction of the wife is limited only by the combined net income shown on the joint return.

5. The Circuit Court of Appeals erred in holding and deciding that the husband was not the donor of these charitable contributions.

6. The Circuit Court of Appeals erred in failing to hold and decide that the husband was the donor of these gifts.

7. The Circuit Court of Appeals erred in sustaining the ruling of the Board that certain evidence should be barred from the record as immaterial.

8. The Circuit Court of Appeals erred in failing to hold and decide that the Board abused its discretion in barring from the record certain testimony.

Reasons Why Writ Should Be Granted.

1. The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Third Circuit in *Janney* v. *Commissioner,* 108 Fed. (2d) 562.

2. The apparent conflict between Article 51-1 of Regulations 86 issued under the Revenue Act of 1934 and Article 23(o)-1 of the same Regulations should be passed upon by this Court in the interest of uniform administration of the Revenue Acts.

3. This Court should pass upon the question as to whether the Board erred in barring certain testimony from the record.

4. The argument of the taxpayers in the Court below that the husband in this case was, in fact and in substance, the donor of these charitable gifts should be passed upon by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court on a day designated for its review and determination a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case numbered 234 and entitled *"Henry W. Taft and Julia W. S. Taft, Petitioners* v. *Commissioner of Internal Revenue, Respondent"*; to the end that said cause may be reviewed and determined by this Court as provided by law, that the determination of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed,

and that your petitioners may have such other and further relief as may be just.

Dated: New York, N. Y., June 19, 1940.

HENRY W. TAFT,
JULIA W. S. TAFT,
Petitioners.

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Office & P. O. Address,
14 Wall Street,
New York, N. Y.

HENRY W. TAFT,
CLARENCE CASTIMORE,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

CLARENCE CASTIMORE, being duly sworn according to law, deposes and says that he is one of the attorneys for the petitioners; that he prepared the foregoing petition and that the facts therein stated are true to the best of his information and belief.

CLARENCE CASTIMORE.

Subscribed and sworn to before me this 19th day of June, 1940.

ALBERT SOCOLOW,
Notary Public,
Bronx County No. 209,
Bronx County Register's No. 153 S 41;
Certificate filed in New York County No. 761;
New York County Register's No. 1 S 510;
Appointment expires March 30, 1941.
(Notarial Seal)

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

POINT I.

The decision below is in substantial conflict with *Janney* v. *Commissioner*, 108 Fed. (2d) 564 (C. C. A., 3rd) certiorari granted April 29, 1940.

The Board of Tax Appeals in deciding this case stated as follows:

> "The spouses do not lose their identities as individual taxpayers by joining in a single income tax return. *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, and cases therein cited; *Walter C. Janney*, 39 B. T. A. 240.
>
> Accordingly, the amount of the deduction in the joint return on account of the wife's contributions to charities must be determined on the basis of her individual net income and the application thereto of the statutory formula in section 23(o), *supra*, as was done by the respondent herein" (Rec., pp. 20-21).

The Circuit Court of Appeals affirmed on the authority of *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, which holds that husband and wife filing a joint return are separate taxpayers and the capital loss of the one may not be offset against the capital gain of the other.

The *Janney* case, referred to in the Board's statement above, was later reversed. *Janney* v. *Commissioner*, 108 Fed. (2d) 564 (C. C. A., 3rd). Therein the court stated:

> "The Government suggests that husband and wife cannot be regarded as a joint entity—have not been by the cases construing tax statutes. But that seems to us unconvincing in considering whether a statute authorizing a single return for both does not also contemplate a consolidation of the losses and gains of both, a more rational and more direct construction of a statute evidently intended by Congress to be in favor of the taxpayer. Since the statute provides that in the case of a joint return 'the tax shall be computed on the aggregate income' it logically and indeed necessarily follows, in the absence of an express statutory provision to the contrary, that in arriving at joint net income both gross income and deductions of the spouses must be aggregated and treated as the income and deductions of a single taxpayer."

The conflict between the *Janney* case and the *Pierce* case, on the authority of which the instant case was decided, is fundamental and irreconcilable and depends upon directly opposing views of the underlying theory of joint returns. (See Yale Law Review, May, 1940, pages 1280, *et seq.*) The *Janney* case is also in conflict with *Demuth* v. *Commissioner*, 100 Fed. (2d) 1012 (C. C. A., 2d). Certiorari denied 307 U. S. 627; *Nelson* v. *Commissioner*, 104 Fed (2d) 521 (C. C. A., 4th); *Sweet* v. *Commissioner*, 102 Fed. (2d) 103 (C. C. A., 1st). Certiorari denied 307 U. S. 627; and *Gaines* v. *Commissioner* (C. C. A., 2nd) April 22, 1940. Certiorari was granted on April 29, 1940 in the *Janney* case because of this conflict. In agreement with *Janney* v. *Commissioner, supra*, on the intent of Congress with respect to joint returns is *Commissioner* v. *Thomas*, 84 Fed. (2d) 562 (C. C. A., 5th) where the court stated:

"As applied to this case, the plain, common sense meaning of the provision 'the tax shall be computed on the aggregate income' is that the income of the spouses is to be added together and losses sustained by either or both of them are to be deducted from that aggregate in determining the net taxable income."

While the above cases involve different deductions than the one in controversy in the present case, the principle upon which the right to the deduction rests is identical. Therefore, the same reason exists for granting the writ in this case as existed in the *Janney* case, i. e., an irreconcilable conflict in the Circuits on the force and effect of a joint return.

POINT II.

There is an apparent conflict between Article 51-1 of Regulations 86 and Article 23(o) of Regulations 86, issued under the Revenue Act of 1934.

Article 51-1 of Regulations 86, issued under the Revenue Act of 1934 provides, with respect to husband and wife, as follows:

"If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income."

That this regulation is ambiguous is evident from the fact that the Second Circuit in *Pierce* v. *Commissioner, supra,* and the Third Circuit in *Janney* v. *Commissioner, supra,* cannot agree as to its meaning and effect.

Article 23(o)-1 of Regulations 86 provides with respect to contributions, as follows:

> "Whether a husband and wife make a joint return or separate returns, the 15 per cent. limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts."

If the decision of the Third Circuit in the *Janney* case is correct, it is obvious that the last quoted regulation is in conflict with the provisions of Article 51-1 quoted above. The same provisions are in the present Regulations 103 (Sec. 19.51-1 and Sec. 19.23[o]-1). It is a matter of general public concern that this apparent conflict be resolved so that there may be a consistent and uniform administrative application of the statute.

POINT III.

The Board abused its discretion in barring certain testimony from the record.

As has been indicated above, the portion of Article 51-1 quoted above is clearly ambiguous. At the same time that this regulation was outstanding, there were other published rulings also outstanding which were clearly in conflict with the interpretation which the Commissioner now places upon Article 51-1. (See Sol. Op. 90, 4 C. B. 236; I. T. 1997, III-1 C. B. 149; and CCH 1933, Vol. III, Par. 6037, all of which treat husband and wife filing jont returns as a single taxable entity.) In order to aid the Board in its interpretation of the regulation and the statute, the petitioners offered at the trial certain evidence tending to show the actual practice of the Commissioner's

agents in auditing returns while the aforesaid ambiguous regulation was on the books. All of this evidence was either stricken from the record (Rec., pp. 34, 36 and 38) or barred completely as immaterial. We submit that the actual practice of the Commissioner's agents in applying a regulation to specific cases especially where the regulation is susceptible of two or more meanings and is seemingly in conflict with another regulation, is just as important an aid to the practical interpretation of the regulation and the statute under which it was issued as are published rulings, and that the evidence offered was material and the Board abused its discretion in barring it.

POINT IV.

Even if it be determined in the *Janney* case that husband and wife filing a joint return are not a single taxable entity, still under the peculiar circumstances of this case, the deduction should be allowed.

The Board of Tax Appeals held that since the husband had transferred the funds to the wife without placing any specific restriction on them, they must be regarded as her property and free from any family direction or control and the limitations of contributions to charity made out of this fund must be computed upon her separate income.

The evidence is undisputed that all of the funds out of which the wife made these contributions with the exception of the minor amount mentioned in the statement of facts, came directly from the husband who had made a practice for years of turning over funds to her (Rec., pp. 32-33). He discussed some of the charitable gifts with her; he had known for years that a portion of these funds would be used for charities; each year he procured a list of the charities from her; and he continued to acquiesce

in her use of a portion of the funds in that manner (Rec., p. 33). It was argued below that under these circumstances, the wife was merely the agent of the husband or the conduit through which his income flowed to charitable uses and that the real substance of the matter was that he was the donor and the taxpayer within the intent of Section 23(o) of the statute, and, therefore, he was entitled to the deduction. The Circuit Court of Appeals apparently did not consider this argument. It is contended that this argument has merit and it should be carefully reconsidered.

Conclusion.

Because of the fundamental conflict between this case and the *Janney* case and for the other reasons stated above, it is submitted that the petition for writ of certiorari should be granted.

Dated: New York, N. Y., June 19, 1940.

Respectfully submitted,

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